

**IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA**

|                                 |   |   |
|---------------------------------|---|---|
| <b>State of North Dakota,</b>   | ) |   |
|                                 | ) |   |
| <b>v.</b>                       | ) | <b>Supreme Court No.: 202000006</b>         |
| <b>Plaintiff and Appellee,</b>  | ) | <b>District Court No.: 36-2017-CR-00666</b> |
|                                 | ) |   |
| <b>v.</b>                       | ) |   |
|                                 | ) |   |
| <b>Amy Jo Vaagen,</b>           | ) |   |
|                                 | ) |   |
| <b>Defendant and Appellant.</b> | ) |   |
|                                 | ) |   |

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**Appeal from Order Revoking Probation entered on December 18, 2019 by Ramsey County District Court, Northeast Judicial District, State of North Dakota, the Honorable Lonnie Olson, presiding.**

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**BRIEF OF THE APPELLEE**

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## **ISSUES PRESENTED**

[¶1] I. Whether the District Court improperly modified the conditions of Ms. Vaagen’s unsupervised probation.

## **STATEMENT OF THE CASE**

[¶2] The State adopts the Appellant’s Statement of the Case.

## **STATEMENT OF THE FACTS**

[¶3] Amy Vaagen (hereinafter “Vaagen”) entered a plea of guilty to Preventing Arrest, Possession of a Controlled Substance and Possession of Drug Paraphernalia, in violation of N.D.C.C. §§ 12.1-08-02; 19-03.1-23; and 19-03.4-03. The district court ordered a deferred imposition of sentence on Vaagen June 11, 2018. (Appellant’s Appendix at 14). During the sentencing, the Court also ordered as a condition of Vaagen’s unsupervised probation she submit to random drug UA testing, one time per week, for the duration of her probation. (Appellee’s Appendix at 14, Change of Plea and Sentencing Transcript at In 9-20). This random UA condition of probation, while orally stated by the district Court was not put into the sentence. (emphasis added)

[¶4] Eleven months later, the district court issued an “Amended” Order Deferring Imposition of Sentence. (Appellant’s Appendix at 18). This Amended Order contained the random drug UA testing orally ordered at the time of Vaagen’s Sentencing. This Amended Order has a certification of mailing indicating Vaagen and the State were provided a copy of the Amended Order after it was entered. (Appellant’s Appendix at 18).

[¶5] Subsequently, the State filed several petitions to revoke Vaagen’s probation. (Appellant’s Appendix at 21, 30 and 36). Each allegation submitted by the State alleged violations of the random drug UA testing. The district court ultimately revoked Vaagen’s deferred imposition of sentence and entered criminal judgment imposing a period of local confinement on December 18, 2019 (Appellant’s Appendix at 71). It is from this Order Vaagen appeals.

### **STANDARD OF REVIEW**

[¶6] A district court’s decision to amend a criminal judgment will not be reversed unless the district court abused its discretion. State v. Peterson, 2016 ND 192 ¶8, 886 N.W.2d 71. (citing State v. Rueb, 249 N.W.2d 506, 511-512 (N.D.1976)). “A district court abuses its discretion if it acts in an arbitrary, unreasonable, unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law.” Id. (quoting State v. Moos, 2008 ND 228, ¶30, 758 N.W.2d 674).

### **LAW AND ARGUMENT**

[¶7] **I. Was the District Court’s modification of Vaagen’s terms of probation under the Amended Deferred Imposition of Sentence an abuse of discretion?**

[¶8] Vaagen was sentenced on June 11, 2018 to a deferred imposition of sentence and a review of the Change of Plea and Sentencing Transcript shows the Court imposed on Vaagen random UA testing once per week for the duration of the deferred period. (Appellee’s Appendix pg. 14, lines 9-20). That oral pronouncement of the district court did not make it into the Original order. The State assumes the district court amended the order

to reflect what was orally pronounced by the district court at the time of initial sentencing. However, nothing in the record indicates why the district court amended the order. N.D.R.Crim.P. 36 provides the court, *after giving any notice it considers appropriate*, may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission. Here the district court *sua sponte* amended the judgment and without notice this is an abuse of discretion. The State's position is this matter should be remanded to the trial court.

[¶9] The other issues raised by Vaagen were not addressed to the district court. Issues not raised before the district court, including constitutional issues, will not be considered for the first time on appeal. State v. Gray, 2017 ND 108, ¶ 13, 893 N.W.2d 484. Any issues, including constitutional ones Vaagen wants to make should be addressed to the district court upon a remand.

### **CONCLUSION**

[¶10] The district court sua sponte amended the Order Deferring Imposition of Sentence, without giving notice to any of the parties. The matter should be remanded to allow notice to the parties' and any issues should be addressed to the district court at that time.

Respectively submitted on June 17, 2020.

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|                                 | ) |   |

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This Appellee’s Brief and Appendix complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure as it contains 22 pages.

[¶2]    Respectively submitted on June 17, 2020.

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|                                 | ) |   |

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[¶1] I certify I provided an electronic copy of the Appellee’s Brief, Appelle’s Appendix, Certificate of Compliance to counsel for Appellant via electronic delivery to :

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[¶2] Respectively submitted on June 17, 2020.

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Respectively submitted on June 17, 2020.

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